

NO. 82 - 1061

Office-Supreme Court, U.S.

IN THE

<del>DEC</del> 9 1982

SUPREME COURT OF THE UNITED STATES

ALEXANDER L. STEVAS, CLERK

December Term, 1982

ROBERT BEGASSAT

Petitioner,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA

Respondents.

On Petition For Writ of Certiorari To The Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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John L. Gubbins Three First National Plaza Suite 2300 Chicago, Illinois 60602

#### QUESTIONS PRESENTED FOR REVIEW

- 1. Whether the Illinois Appellate Court's disposition of petitioner's appeal by unpublished order violated his rights to due process?
- 2. Whether the Illinois Circuit Court's refusal to grant specific performance because of an affirmative defense which was neither pleaded nor proven but raised <u>sua sponte</u> after trial was a denial of due process?

#### TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GROUNDS ON WHICH JURISDICTION IS BASED	iv
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	iv
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF WRIT	. 9
I. THE ILLINOIS APPELLATE COURT'S DISPOSITION OF PETITIONER'S APPEAL BY AN UNPUBLISHED ORDER WHICH FAILED TO ADDRESS SUBSTANTIAL CONSTITUTIONAL ISSUES VIOLATED PETITIONER'S DUE PROCESS RIGHTS.	
II. THE ILLINOIS CIRCUIT COURT'S RE- FUSAL TO GRANT SPECIFIC PERFORM-	

	PAGE
ANCE BECAUSE OF AN AFFIRMATIVE DEFENSE WHICH WAS NEITHER PLEADED NOR PROVEN BUT RAISED SUA SPONTE AFTER TRIAL WAS A DENTAL OF HIS DUE PROCESS RIGHTS	15
CONCLUSION	20
TABLE OF AUTHORITIES	
Cases	
Application of Gault, 387, U.S. 1, 31 (1967)	18
Giannis v. Ordean, 234 U.S. 385, 394 (1914)	18
Goldberg v. Kelly, 397 U.S., 254, 267 (1970)	18
Hughes v. Rowe, 101 S. Ct. 173 (1980).	13
Lambert v. California 355 U.S. 226, 228 (1958)	17
Millner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963)	18

## GROUNDS ON WHICH JURISDICTION IS BASED

The Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1257(3). The order of the Illinois Supreme Court denying petitioner's Petition For Appeal As a Matter of Right and Petition For Leave to Appeal was entered October 5, 1982. The Illinois Appellate Court's Order Disposing Of Appeal Under Supreme Court Rule 23 was entered April 12, 1982. The Illinois Supreme Court stayed its mandate pending the filing and disposition of a petition for writ of certiorari to this Court. (Exhibits 1, 2 and 3)

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States
Constitution which recites in pertinent part:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

December Term, 1982

NO.

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Petitioner,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA

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#### STATEMENT OF THE CASE

Petitioner Robert Begassat seeks review of an unfavorable decision rendered after trial on his suit against respondents John Magna and the Cosmopolitan National Bank of Chicago for specific performance. Robert Begassat claimed to have exercised an option to purchase contained in a lease with respondents, and he requested the Circuit Court of Cook County to enforce the option provision. The Circuit Court refused and the Illinois Appellate Court in an unpublished order affirmed. The Illinois Supreme Court refused to review the decision of the Appellate Court.

On September 11, 1969 Robert Begassat entered into a lease with John Magna for a residence at 1404 N. LaSalle Street, Chicago, Illinois. The residence was a beautiful, old three floor mansion

and Robert Begassat who had just finished his studies at the University of Chicago moved downtown from Hyde Park. He decided to share rooms in the residence with other young career people in a cooperative living arrangement. Each resident contributed to the expenses and shared domestic tasks.

The initial lease was for 5 years beginning October 15, 1969 at a rental of \$700 monthly. It also gave Robert Begassat an option to purchase the property with an allowance of \$300.00 monthly for an agreed credit toward the purchase price. The price was to be determined by professional appraisal.

The landlord, John Magna, owned another residence immediately North of the leased property.

Robert Begassat was given a Right of First Refusal on this property, 1406 N. LaSalle Street also to

be determined by appraisal.

In April, 1974, John Magna notified Robert Begassat that he'd found a potential buyer for 1406 N. LaSalle Street. Begassat exercised his right of first refusal on May 15, 1974. He accompanied this letter with a signed offer to purchase both properties and offered a price of \$116,000.00 He advised that each property had been appraised, 1404 N. LaSalle at \$46,000.00 and 1406 N. LaSalle at \$70,000.00.

John Magna refused the Offer to Purchase. On June 28, 1974, Begassat filed suit in Chancery in the Circuit Court of Cook County, Illinois to seek Specific Performance.

The parties entered into a settlement agreement and the suit was dismissed.

The settlement agreement established a new lease for 1404 N. LaSalle at \$850 monthly to June 30, 1975. The Option to purchase was kept in force but at a price of \$95,000. Begassat was again given a Right of Final Refusal on 1406 N. LaSalle Street at \$120,000 exerciseable by October 25, 1974. The settlement agreement also provided that if Magna breached the agreement "... Begassat shall have all of the right which he had prior to entering into this agreement and prior to the dismissal of said action ... Presumably, this would mean that in order to be restored to his status quo in the event of a breach by Magna, Begassat would (a) have the right to buy both buildings at their appraised value the date he first attempted to exercise his option, May 15, 1974 (b) receive a \$300 monthly credit against the purchase price from October 15, 1969, when he first took occupancy.

On March 26, 1976, Begassat attempted to purchase 1404 N. LaSalle at the price set forth in the Settlement Agreement, \$95,000. This time both parties signed a Sales Contract and their attorneys entered into an Escrow Agreement.

Begassat alleged that Magna did not comply with either the Contract or Escrow Agreement because he failed to cure various building code and building line violations. There were several openings in the basement of 1404 LaSalle Street leading to 1406 LaSalle Street that had to be closed. Magna did not do the work and according to Begassat intentionally prevented it from being done.

Begassat again filed a suit in Chancery in the Circuit Court of Cook County, Illinois, for Specific Performance of his Option To Purchase 1404
N. LaSalle Street under the Contract of March 27,
1975. John Magna filed a Counterclaim for Forcible
Detainer.

The Circuit Court of Cook County, Judge George
A. Higgins found against Begassat and in favor of
Magna on February 5, 1981. An order of eviction
was entered against Begassat. (Exhibit 3) He then
filed an Appeal to the Appellate Court of Illinois
and in a summary opinion under Illinois Supreme
Court Rule 23 his appeal was denied on April 12,
1982. (Exhibit 2 and 3) Begassat filed a Petition
For Leave To Appeal to the Illinois Supreme Court.
This was denied on October 5, 1982. On November
8, 1982 the Illinois Supreme Court Ordered a Stay
pending filing of a Petition for Writ of Certiorari
by December 9, 1982.

By October 15, 1982, Robert Begassat had lived

at 1404 N. LaSalle Street for 13 years. He should have earned \$46,800 in rental credits toward the purchase price. The original appraisal of the residence was \$46,000. If his allegation that Magna intentionally breached the contract by refusing to cure the building violations was correct, Begassat should by 1982 have acquired the property just by proper allocation of his rental credits. Instead he has been ordered evicted. This is an unconscienable forfeiture without due process of law. Illinois Supreme Court Rule 23 enabled the Illinois Appellate Court to strip Robert Begassat of his property without stated reason. The Constitution does not envision, an Appellate Court, however over burdened, abdicating its duty to provide a citizen with the reasons for its actions. The Rule 23 proceeding may be a short cut but it is a short cut to anarchy.

#### REFSONS FOR ALLOWANCE OF WRITE

I.

THE ILLINOIS' APPELLATE COURT'S DISPOSITION OF PETITIONER'S APPEAL BY UNPUBLISHED ORDER VIOLATED HIS DUE PROCESS RIGHTS.

Illinois Supreme Court Rule 23 permits the appellate court to summarily dispose of a case by unpublished order. The Rule states in relevant part:

A case shall be disposed of by opinion when a majority of the panel deciding the case determined that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; or (3) the decision is of

substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history.

\* \* \*

All cases not required by the foreging paragraph to be disposed of by opinion shall be disposed of by a written order which shall succinctly state the facts, the contentions of the parties, the reasons for the decision, the disposition, and the names of the participating judges. Orders are not precedential and will not be published.

The Appellate Court disposed of Begassat's appeal by unpublished order pursuant to Rule 23.

Although the concept of due process does not require appellate review, it is fundamental to ordered liberty that a court follow its own rules. In the instant case, the appellate court did not follow Rule 23 choosing instead to render an order not "stating" but hiding "the reasons for its decision." The result is an arbitrary decision lacking any reference to the issues and arguments which petitioner raised.

Begassat's brief before the Illiois Appellate
Court raised four issues and cited numerous authorities in support of its arguments. The issues
raised were stated as follows:

The Trial Court's refusal to grant specific performance because of an affirmative defense which was neither pleaded nor proven but raised by the Trial Court, sua sponte, after the trial was a denial of procedural due process.

- II. The Trial Court imposed a nonexistent burden of proof on the Plaintiff.
- III. The Trial Court's judgment denying specific performance was contrary to equitable principles.
- IV. The Trial Court's judgment declared a forfeiture of the realty contract contrary to law.

The Appellate Court addressed only Issue III completely ignoring the other three issues including the first which raised serious constitutional deficiencies. Not only did the respondents make no effort to contradict, to distinguish or even to argue the appropriateness of the 25 reported decisions cited, all of which are relevant

and set forth current case law on the issues, but the Appellate Court failed to take up the other three issues in its order and refused to indicate any reasons for deciding them against petitioner.

Certainly the magnitude of the due process defect raised in the first issue merited a published opinion. It is an "important" issue which the Appellate Court had not settled definitively by published opinion. Thus under the rationale of sub (1) of Rule 23 the Appellate Court should not only have addressed the issue, it should have published an opinion giving its reasons.

In <u>Hughes</u> v. <u>Rowe</u>, 101 S. Ct. 173 (1980), this Court criticized the Seventh Circuit Court of Appeals for disposing by unpublished order of a case "purportedly having no precedential significance." Seventh Circuit Rule 35 governs publication and is almost identical to Illinois Supreme Court Rule 23. Noting that the issue raised was "novel",

this Court in a <u>per curiam</u> opinion summarily reversed expressing in passing its disatisfaction with the use of Rule 35.

The wisdom of a rule such as Illinois Supreme Court Rule 23 is dubious. It promotes a lack of accountability and fosters judicial laziness and arbitrariness. It diminishes the care and attention devoted to the decision making process eroding the principle of stare decisis and thereby leading to a judicial system based on ad hoc decision making. Robert Begassat's appeal merited a more thoughtful consideration than that reflected in the Illinois Appellate Court's unpublished order. Rule 23 did not bring about judicial economy as intended but provided a rug under which novel and important issues could be swept.

II.

THE ILLINOIS CIRCUIT COURT'S REFUSAL TO GRANT SPECIFIC PERFORMANCE BECAUSE OF AN AFFIRMATIVE DEFENSE WHICH WAS NEITHER PLEADED NOR PROVEN BUT RAISED SUA SPONTE AFTER TRIAL WAS A DENIAL OF DUE PROCESS.

In announcing its decision following trial, the Circuit Court stated:

"That lack of communication between the parties thereto prevented the resolution of the existing differences and thereby rendered performance of said contract impossible."

In his Amended Answer To Complaint, Magna raised two affirmative defenses. First he contended that Begassat failed to pay Magna the \$16,000.00 required by paragraph 3(b) of the contract and that he further failed to appear

at the closing. Second, Magna contended that Begassat refused to abide by the lease of September 30, 1974. These affirmative defenses were answered by Begassat. Nowhere in the pleadings does Magna allege that the contract was impossible of performance. The Circuit Court's pronouncement after trial was the first occasion upon which the issue was raised.

By raising <u>sua sponte</u> after trial the defense of impossibility of performance, the Circuit Court violated Begassat's due process rights. The Court's announcement and finding took him by surprise, prevented him from questioning any evidence the Court considered in reaching its decision, and precluded him from offering evidence to the contrary.

The Fourteenth Amendment to the United States

"...nor shall any State deprive any person of life liberty, or property, without due process of law..."

Without question a substantial property interest is at stake here. Mr. Begassat stands to lose any interest and all his accumulated equity in the 1404 North LaSalle Street property.

The Court has repeatedly asserted the importance of elemental due process safeguards of notice and opportunity for a hearing. Concerning the notice guaranteed by due process this Court's mind is clear. "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." Lambert v. California 355 U.S. 226, 228 (1958). Adequate notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable

opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." Application of Gault, 387, U.S. 1,31 (1967) So also concerning the opportunity to be heard, this Court has made equally strong pronouncements. "The fundamental requesite of due process law is the opportunity to be heard." Giannis v. Ordean, 234 U.S. 385, 394 (1914) Effective opportunity at a minimum requires the chance "to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg v. Kelly, 397 U.S., 254, 267 (1970). Furthermore, effective notice requires that a litigant be "allowed to rebut the bases "for an adverse ruling or judgment." Millner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963)

Robert Begassat never had adequate notice nor

effective opportunity to be heard before the Circuit Court extinguished his interests in the 1404 LaSalle Street property. Magna never pled impossibility of performance of the contract. Nor did the Circuit Court prior to entering its verdict ever interject such a defense. The failure of the Circuit Court and Magna to notify Begassat that the impossibility defense was under consideration as a way of disposing of his suit denied him due process. It caught him by surprise and denied him the opportunity to question adverse testimony and offer evidence in opposition.

The Circuit Court's verdict offends the basic procedural principles of our system of law and must be condemned as a denial of due process. A judgment entered without notice of the issues a Court deems vital to a case and without the

opportunity to address those issues is an arbitrary declaration having no reference to the rights of the litigants.

#### CONCLUSION

To prevent manifest injustice and to protect petitioner's basic due process rights, Robert Begassat hereby prays this Court to grant the Petition for Writ of Certiorari for a plenary review of this case.

Respectfully submitted

Lowell B. Komie 155 North Michigan Avenue Suite 600 Chicago, Illinois 60601

John L. Gubbins
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Suite 2300
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Dated: December 8, 1982

#### APPENDIX

#### EXHIBIT

- Order of Illinois Supreme Court Denying
  Review
- 2 Order of Illinois Appellate Court Affirming Circuit Court Decree
- 3 Illinois Circuit Court Decree

#### EXHIBIT 1

ILLINOIS SUPREME COURT JULEANN HORNYAK, CLERK SUPREME COURT BUILDING SPRINGFIELD, IL 62706

October 5, 1982

Mr. Ian McMillan Attorney at Law 135 S. LaSalle St., Rm. 754 Chicago, IL 60603

No. Robert Begassat, petitioner, vs. The Cosmopolitan National Bank of Chicago as Trustee, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today <u>DENIED</u> the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

#### EXHBIT 2

#### NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION APRIL 12, 1982

81-787

#### IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

ROBERT BEGASSAT,	) APPEAL FROM THE ) CIRCUIT COURT OF
Plaintiff-Counter	) COOK COUNTY.
Defendant, Appellant,	)
v.	(
THE COSMOPOLITAN NATIONAL	) HONORABLE
BANK OF CHICAGO AS TRUSTEE	) GEORGE A. HIGGINS,
UNDER TRUST NO. 13199 and	) PRESIDING.
JOHN MAGNA,	)
Defendants-Counter	;
Plaintiffs, Appellees.	)

## ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Robert Begassat brought an action to compel specific performance of a contract to sell realty. The trial court entered a decree denying specific performance. In this appeal, Begassat argues that the trial court erred in denying specific performance.

Specific performance is not a matter of right, and one seeking to specifically enforce a contract for the sale of realty must prove that he has complied with its terms, or was able, ready and willing to comply but was prevented from doing so by the other party. (Beesley Realty & Mortgage Co. v. Busalachi (1963), 28 Ill. 2d 162, 165, 190 N.E. 2d 715; Lovins v. Kelley (1960), 19 Ill.2d 25, 166 N.E.2d 69.) Begassat maintains that he was able, ready and willing to close on

the original designated closing date, but that he was prevented from doing so because of the pendency of a lawsuit against Magna (the seller and a defendant herein) involving a building code violation. Magna accepted an offer by one of Begassat's tenants, Snyder, to do the necessary repair work for \$850. When Snyder demanded prepayment, Magna set aside \$1,000 with his attorney for the specific purpose of paying Snyder for his services. When Snyder had not begun to do the repairs after a substantial period of time, Magna suggested to Begassat that he take the property in an "as is" condition and accept a credit against the purchase price. Begassat rejected this suggestion.

The evidence shows that Magna was anxious and willing to close, but that Begassat was unwilling, inaccessible and used stalling tactics which

prevented the parties from closing. As a result, we find that Begassat was not entitled to specific performance of the real estate contract.

Begassat raises a few subsidiary issues which, in our opinion do not merit mention.

We therefore affirm the judgment of the circuit court of Cook County.

JUDGMENT AFFIRMED.

CAMPBELL, P.J., McGLOON and O'CONNOR, JJ.

#### EXHIBIT 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

ROBERT BEGASSAT, Plaintiff,	}
V.	
COSMOPOLITAN NATIONAL BANK, as Trustee, et al., Defendants.	) NO. 79 CH 3056
JOHN MAGNA,	
Counterplaintiff,	) FORCIBLE DETAINER ACTION
v.	}
ROBERT BEGASSAT,	}
Counterdefendant.	;

### DECREE

This cause having been heard on the trial call and the Court having heard the testimony of various witnesses, having examined documents received in evidence, having heard arguments of counsel and being fully advised in the premises,

The Court finds as follows:

- A. Plaintiff has failed to prove that he is entitled to the relief sought in Count I of the Complaint and such Count should be dismissed.
- B. As to Count II of the Complaint, the Court finds the issues in favor of Defendantss and against Plaintiff.
- C. The Counterclaimant, John Magna, is entitled to a judgment in his favor and against the Counterdefendant, Robert Begassat, for possession of all the premises at 1404 N. La Salle St., Chicago.

It is therefore Ordered, Adjudged and Decreed as follows:

Count I of the Complaint is dismissed for

want of equity, without costs.

- Judgment is entered in favor of Defendants and against Plaintiff on Count II of the Complaint, without costs.
- 3. Judgment for possession of the entire premises at 1404 N. LaSalle St., Chicago, is entered in favor of Counterclaimant, John Magna, and against Counterdefendant, Robert Begassat, and a writ of restitution shall issue for the purpose of enforcing such judgment. The issuance of such writ shall be stayed for 45 days.
- 4. This decree is entered nunc pro tunc as of February 3, 1981, the date on which the court delivered its oral decision.
- 5. The Court finds that there is no just reason for delaying enforcement of, or appeal from, this decree.

Enter:	
	Judge

JAN 31 1983

ALEXANDER L. STEVAS.

No. 82-1061

# In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT BEGASSAT,

Petitioner.

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

#### BRIEF OF RESPONDENTS IN OPPOSITION

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Counsel of Record for Respondents

**JANUARY 28, 1983** 

# ADDITIONAL QUESTION PRESENTED

Whether a Petition for Writ of Certiorari to the Illinois Supreme Court should be denied when the highest Illinois court deciding the case was the Illinois Appellate Court.

# TABLE OF CONTENTS

P	AGE
ADDITIONAL QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISION, STATUTE AND	
COURT RULES INVOLVED	V
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. The Petition For A Writ of Certiorari To The Illinois Supreme Court Should Be Denied Because The Highest Illinois Court Deciding The Case Was The Illinois	
Appellate Court	5
II. Petitioner Raises No Substantial Federal Question and Failed To Raise And Preserve Any Federal Issue In The State Courts	6
CONCLUSION	10

# TABLE OF AUTHORITIES

CASES

	PAGE
Beck v. Washington, 369 U.S. 541 (1961)	7
Bowe v. Scott, 233 U.S. 658 (1914)	6
Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam)	5
DeSaussure v. Gaillard, 127 U.S. 216 (1888)	6
Gorman v. Washington Univ., 316 U.S. 98, rehearing denied, 316 U.S. 711 (1942)	6
Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933)	9
Herndon v. Georgia, 295 U.S. 441 (1935)	7-8
Hughes v. Rowe, 449 U.S. 5 (1980)	6-7
John v. Paullin, 231 U.S. 583 (1913)	9
Lane v. Wallace, 131 U.S. app. 219 (1881)	5
McQuade v. Trenton, 172 U.S. 636 (1899)	7
Pennsylvania Rd. Co. v. Illinois Brick Co., 297 U.S. 447 (1936)	5
Pyle v. Springfield Marine Bk., 330 Ill. App. 1 (1946)	9
Rabus v. Calcari, 16 Ill. 2d 99 (1959)	9
Randall v. Board of Commissioners, 261 U.S. 252 (1923) (mem.)	5
Taylor v. McKeithen, 407 U.S. 191 (1972) (per curiam)	7
United States v. American Ry. Express Co., 265 U.S. 425 (1924)	9

2	AGE
Webb v. Webb, 451 U.S. 493 (1981) dismissing petition for cert.	6
Western Union Telegraph Co. v. Hughes, 203 U.S. 505 (1906)	5
CONSTITUTIONAL PROVISION	
1970 ILL. CONST. art. 1, §2	8
STATUTE AND COURT RULES	
28 U.S.C. §1257(3)	5, 8
Fed. R. App. P. 36	7
Ill. Sup. Ct. R. 23, as it existed prior to April 1, 1982	7
Ill. Sup. Ct. R. 341(e)(7)	7
Books	
4 C.J.S. Appeal & Error §153c (1957)	9
5A Nichols, Illinois Civil Practice \$5663 (1975)	9

# CONSTITUTIONAL PROVISION, STATUTE AND COURT RULES INVOLVED

1970 ILL. CONST. art. 1, §2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

# 28 U.S.C. §1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

# Fed. R. App. P. 36

ENTRY OF JUDGMENT. The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Ill. Sup. Ct. R. 23, as it existed prior to April 1, 1982

When the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking, it may dispose of the case by an order briefly stating the reasons for its decision.

### Ill. Sup. Ct. R. 341(e)(7)

- (e) Appellant's Brief. The appellant's brief shall contain the following parts in the order named:
  - (7) Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. As to cases involving constitutional questions appealed directly from the circuit court to the Supreme Court, see Rule 302(b). Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal, excerpts or abstract where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM. 1982

# No. 82-1061

ROBERT BEGASSAT,

Petitioner.

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION

### STATEMENT OF THE CASE

Because the petition of petitioner Robert Begassat ("Begassat") is incomplete and inaccurate, respondent John Magna ("Magna")<sup>2</sup> is compelled to submit this statement of the case.

This case involves two claims. First, Begassat seeks specific performance of a written March 27, 1975, contract (the "contract") with Magna to purchase premises commonly known as 1404 North LaSalle Street, Chicago, Illinois (the "premises"). The contract allegedly arose from Begassat's proper exercise of an option to purchase contained in his written October, 1974, lease from

One error may confuse the Court: Begassat's "attempted . . . purchase" occurred on or about March 27, 1975, not March 26, 1976, as stated in Pet. 6, paragraph 1. Statements unsupported by the record include the following: Pet. 2, paragraph 2; Pet. 4, paragraph 1, first sentence; and Pet. 8, second complete sentence. The statement in the first complete sentence on Pet. 8 does not appear in the record, although in answer to a hypothetical question, Begassat contended \$45,352.97 (\$10,155.60 principal and the balance interest), R. 132, 138-39, would have been payable under terms of the mortgage he allegedly would have signed if the contractually-scheduled 1975 closing had occurred. R. 136. Begassat's claim, in Pet. 17, that he "stands to lose any interest and all his accumulated equity" in the premises is misleading. The record contains no indication that he has any interest, or equity in the premises, particularly in light of the trial court's decree. Pet. Ex. 3.

<sup>&</sup>lt;sup>2</sup> "John Magna" is used to refer to both respondents. Respondent The Cosmopolitan National Bank of Chicago as trustee under trust No. 13199 is an Illinois land trust holding legal title to the subject premises of the litigation, 1404 North LaSalle Street, Chicago, Illinois. Respondent John Magna is the trust's beneficiary with active control of the premises.

Magna of the premises. Second, Magna claims that Begassat is not entitled to this equitable remedy, in part because Begassat was not ready, willing and able to perform under any contract and, therefore, should be evicted from the premises because the lease has expired.

At trial, each party charged the other wrongfully failed to close the contemplated sales transaction.

Begassat claimed Magna prevented the closing by not curing a building code violation preventing good title from being conveyed.

Begassat testified he talked to his mother on the telephone at least ten times from early 1974 through 1975 about arranging financing, or arranging a loan, to raise funds to purchase the premises, although his mother and he never settled on a specific figure. R. 146-47. He also mentioned without elaboration that he spoke with unspecified "other persons" about financing. R. 146.

The contract provided that if Magna did not cure problems such as the building code violation within a specified time during 1975, Begassat could either terminate the contract, or give Magna notice, within ten days after the expiration of the time to cure, that he elected to take title as it was and to deduct money from the purchase price. If Begassat did not so elect, the contract was to become null and void without further action of the parties. R. C8, R. 204. Begassat neither terminated the contract nor elected to take title as is. Further, he never asserted any right under any pre-March 27, 1975, legal relationship, despite the inference contained in Pet. 5.

Magna claimed Begassat prevented him from curing the building code violation. R. 286, 308, 363-65. Between 1976 and 1979, Magna and his attorney repeatedly attempted, without success, to discuss pending matters with Begassat. R. 223, 251-52, 285-86, 364, 374-75. During that time, Begassat's only responses to such attempts were three mailgrams declining meeting times Magna suggested, but offering no alternatives.

The trial court found Begassat failed to prove entitlement to specific performance. The appellate court affirmed that ruling.

### REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to the wrong court and raises issues which are not substantial federal questions and were not properly preserved in the courts below.

I.

THE PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT SHOULD BE DENIED BECAUSE THE HIGHEST ILLINOIS COURT DECIDING THE CASE WAS THE ILLINOIS APPELLATE COURT.

If this Court has jurisdiction of this case under 28 U.S.C. \$1257(3), to review final judgments of "the highest court of a State in which a decision could be had," then the judgment to be reviewed is that of the Illinois Appellate Court, Pet. Ex. 2, since the Illinois Supreme Court on October 5, 1982, denied Begassat's petition for leave to appeal. Pet. Ex. 1. Pennsylvania Rd. Co. v. Illinois Brick Co., 297 U.S. 447, 453 (1936). Nevertheless, the petition is directed to the State Supreme Court and time to seek this Court's review of the appellate court decision has expired. Since the writ is sought to the wrong state court, the petition should be denied. Costarelli v. Massachusetts, 421 U.S. 193, 19; n.3 (1975) (per curiam); Randall v. Board of Commissioners, 261 U.S. 252 (1923) (mem.); Western Union Telegraph Co. v. Hughes, 203 U.S. 505, 507 (1906); Lan: v. Wallace, 131 U.S. app. 219 (1881).

#### П.

PETITIONER RAISES NO SUBSTANTIAL FEDERAL QUESTION AND FAILED TO RAISE AND PRESERVE ANY FEDERAL ISSUE IN THE STATE COURTS.

No substantial federal question is presented or claimed to exist in this case, which was decided solely on state issues in the lower courts, as Pet. Ex. 2 and 3 indicate.

No federal issue was raised and preserved in the state courts and, thus, the petition does not attempt to comply with United States Sup. Ct. R. 21.1(h) and cannot comply. Therefore, Begassat has not sustained his burden of proving this Court's jurisdiction, Gorman v. Washington Univ., 316 U.S. 98, 101, rehearing denied, 316 U.S. 711 (1942); DeSaussure v. Gaillard, 127 U.S. 216, 234 (1888), and the Court is without jurisdiction. Webb v. Webb, 451 U.S. 493 (1981), dismissing petition for cert.; Bowe v. Scott, 233 U.S. 658, 664-65 (1914).

In this Court, Begassat's first point is an objection to the appellate court's Illinois Sup. Ct. R. 23 order, Pet. Ex. 2, which reviewed the evidence in the record and disposed of the appeal, by deciding he was not entitled to specific performance under Illinois decisional law, a determination which mooted all other issues.<sup>3</sup> Begassat

<sup>&</sup>lt;sup>3</sup> Apparently, petitioner's complaint is that the appellate court order did not discuss each issue he raised, but instead dealt only with a dispositive issue. However, he cites no legal authority giving him a federally-protected right to have all such issues formally discussed in a court opinion. He does not suggest the nexus between the order that issued and any alleged constitutional injury and he does not specify the alleged injury the order caused him. The only authority he cites in connection with his argument, *Hughes* v. *Rowe*,

does not dispute that the state court decision is supported by adequate and independent non-federal grounds, so this Court ought not assume jurisdiction to review and reweigh the evidence, or inferences drawn from it. *McQuade* v. *Trenton*, 172 U.S. 636, 639-40 (1899).

Begassat did not raise in Illinois the Rule 23 issue he attempts to raise before this Court. In his petition seeking Illinois Supreme Court appeal, he argues the impropriety of the appellate court's April 12, 1982, order by citing and discussing Rule 23 only as it existed prior to April 1, 1982. However, the rule under which the appellate court order issued became effective April 1, 1982, eleven days before the opinion was issued. Thus, Begassat never presented the Illinois Supreme Court with the opportunity to rule on the propriety of the new, current rule.

Under Ill. Sup. Ct. R. 341 (e)(7), "[p]oints not argued are waived . . . ," a waiver binding on this Court. Beck v. Washington, 369 U.S. 541, 553 (1961); Herndon v.

<sup>\* (</sup>Continued)

<sup>449</sup> U.S. 5 (1980), contains, at most, slight criticism of the federal appellate court's handling of an issue by unpublished order, but does not question the constitutionality of unpublished orders, a procedure encouraged by Fed. R. App. P. 36 and approved in Taylor v. McKeithen, 407 U.S. 191, 194, n.4 (1972) (per curiam).

<sup>\*</sup>Quoted at Pet. 6-7 is the new rule. The old rule provided:

When the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking, it may dispose of the case by an order briefly stating the reasons for its decision.

Georgia, 295 U.S. 441, 442-43 (1935). Begassat, therefore, waived his privilege to complain in this Court about new Ill. Sup. Ct. R. 23, the only version of the rule that could have affected him.

Begassat similarly waived his second argument to this Court. The second issue Begassat raises in this Court (the "sua sponte affirmative defense" issue) never was raised in the state courts as a federal issue, despite the jurisdictional requirement contained in 28 U.S.C. §1257 (3).

The language of his phrasing of this question to the Illinois Appellate Court, Pet. 11-12, does not refer to the Constitution, or any statute of the United States. The "Statutes Involved" section of his appellate court brief does not refer to any federal statute and the only constitutional provision quoted is 1970 ILL, CONST. art. 1, §2, providing that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Pet. App. Ct. Brief 4-5. The twenty sources he cites in this section of his appellate court brief include six Illinois Supreme Court and thirteen Illinois Appellate Court decisions, plus a reference to 17 Am. Jur. 2d Contracts \$506. In his appellate court argument on this issue, Pet. App. Ct. Brief 15-22, he mentions nothing federal and his reference to due process, Pet. App. Ct. Brief 15-16, concerns only Illinois law, noting at page 16 that "Illinois's [sic] courts have long regarded procedural due process as an important element in our legal system."5

<sup>&</sup>lt;sup>5</sup> Petitioner raises no federal issue in his discussion of this issue in Pet. App. Ct. Reply Brief 4-5, where he reiterates his general statements of Illinois law.

Begassat's petition seeking Illinois Supreme Court appeal contains no reference to the sua sponte affirmative defense issue. Even if it did, the sua sponte affirmative defense issue would not present a basis for appellate court reversal. The trial court's oral pronouncement, cited at Pet. 15, was not the court's final order, Pet. Ex. 3, and, therefore, is not appealable in Illinois. Pule v. Springfield Marine Bk., 330 Ill. App. 1, 7 (1946); 5A Nichols, Illinois Civil Practice \$5663 (1975). See, generally, 4 C.J.S. Appeal & Error \$153c (1957). Even if the trial court's oral statement were in error, an Illinois Appellate Court nevertheless could affirm a judgment on any basis appearing in the record, Rabus v. Calcari, 16 Ill. 2d 99, 101-02 (1959), as petitioner admits occurred in this case. This Court may not disregard either this Illinois rule, John v. Paullin, 231 U.S. 583, 585 (1913), or the explicit holding of the state court. Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 512 (1933).

<sup>\*</sup>Further, petitioner presents no reason to assume the court's reference to impossibility was intended to be a legal, rather than a factual, conclusion.

<sup>&#</sup>x27;No quarrel exists, of course, with petitioner's broad statements of general principles of law at Pet. 17-18 (although some of the supportive citations should be corrected as follows: Lambert: 1957; Gault: at page 33; Grannis is the correct spelling, as is Willner, whose correct page citation is at 105). However, as with the many cases he cites in his appellate court brief, the correct statements of law are inapposite.

<sup>\*</sup>This rule accords with the federal rule. United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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